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No. 97

In the Supreme Court of the United States

OCTOBER TERM, 1951

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

THOMAS W. DANT, ET AL., CO-PARTNERS, doing business as DANT & RUSSELL, LTD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the Court of Appeals for the Ninth Circuit entered on March 20, 1952 (R. 590-591), setting aside an order issued by the Board against Thomas W. Dant, *et al.*, d/b/a Dant & Russell, Ltd., hereafter called "the Company" (R. 52-54).

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, is set forth at R. 588-590. The findings of fact, conclusions of law, and order of the Board (R. 6-38, 50-56, 59-60) are reported at 92 NLRB 307, and 95 NLRB No. 44.

JURISDICTION

The decree of the Court of Appeals (R. 590-591) was entered on March 20, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

An unfair labor practice charge was filed by a union at a time when the officers of this union had submitted the non-Communist affidavits prescribed by Section 9 (h) of the National Labor Relations Act, as amended, but the officers of the Congress of Industrial Organizations, with which the charging union was affiliated, had not. The officers of the C.I.O. submitted their affidavits, however, before the Board issued its complaint based upon the union's charge. The question presented is whether the Board may properly issue an unfair labor practice complaint at a time when the charging union is in full compliance with Section 9 (h), notwithstanding that there was not such full compliance when the charge was filed.

STATUTE INVOLVED

The statutory provision principally involved is Section 9 (h) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*). This provision and other relevant portions of that Act are set out in the Appendix, *infra*, pp. 13-16.

STATEMENT

On July 18, 1949, the Company discharged two employees, Max Cassner and Henry J. Christopherson (R. 21; 71, 183, 432). On August 3, 1949, International Woodworkers of America, Local 6-7, the bargaining representative of the Company's employees, filed a charge with the Board, alleging that the discharges violated Sections 8 (a) (3) and (1) of the Act (R. 6-7, 59). There were on file with the Board at that time non-Communist affidavits executed by officers of the union, as required by Section 9 (h) of the Act. Affidavits executed by the officers of the C. I. O. were not filed with the Board until December 22, 1949 (see note 3, *infra*, pp. 4-5).

On or about March 27, 1950, the General Counsel on behalf of the Board issued a complaint based on the charge filed by the union (R. 1-4, 7, 59). The customary proceedings were then held before a Trial Examiner and before the Board. On November 29, 1950, the Board issued its decision and order finding that the discharges were violative of the Act as alleged in the complaint, and directing the Company to take appropriate remedial action. (R. 6-38, 50-56.)

On June 6, 1951, after this Court had decided in the *Highland Park* case[1] that Section 9 (h) required the filing of affidavits by officers of parent federations like the C. I. O., the Company requested the Board to reconsider its order. In that request the Company urged, *inter alia*, that the Board "lacked jurisdiction to proceed with the case" because Section 9 (h) had not been fully complied with. (R. 57-59.)

On July 17, 1951, the Board denied the Company's request for reconsideration (R. 50-60). Respecting the Section 9 (h) contention, the Board held that the Section "requires compliance at the time of the issuance of the complaint, rather than at the time of the filing of the charge" (R. 60, n. 3).[2] The Board found that on this interpretation the requirement of Section 9 (h) had been fully met: "We have administratively determined that the charging union, as well as its parent federation, the Congress of Industrial Organizations, were in full compliance with the filing requirements of Section 9 (f), (g) and (h) of the Act substantially in advance of the issuance of the complaint in this proceeding" (R. 59-60).[3]

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[1] *National Labor Relations Board* v. *Highland Park Manufacturing Company*, 341 U. S. 322 (May 14, 1951).

[2] In support of this holding the Board cited its previous rulings in *Southern Fruit Distributors*, 80 N.L.R.B. 1283, and *H & H Manufacturing Co. Inc.*, 87 N.L.R.B. 1373.

[3] As this Court observed in the *Highland Park* case, the officers of the C.I.O. filed the affidavits prescribed by Section

The Board then petitioned the court below for enforcement of its order of November, 1950 (R. 576-582). The court, without discussing the merits of the unfair labor practice findings, set aside the Board's order on the ground that, under Section 9 (h), "the Board was not empowered to entertain the charge or to issue the complaint or the order" (R. 589). Relying, *inter alia*, on this Court's decision in *Highland Park*, 341 U. S. 322, the court below construed Section 9 (h) as prohibiting the issuance of any complaint unless the charging labor organization was in full compliance at the time its charge was filed. Since the officers of the C. I. O. were not yet in compliance at the time the charge in this case was filed, it followed, in the court's view, that Section 9 (h) barred issuance of the General Counsel's complaint after they came into compliance. (R. 589-590.)

REASONS FOR GRANTING THE WRIT

1. In holding that the disqualification of Section 9 (h) applies as of the time an unfair labor practice charge is filed, rather than as of the time that the General Counsel issues a complaint, the court below, we submit, has misconstrued the plain lan-

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9 (h) on December 22, 1949, about three months before the complaint herein was issued. According to the Board's administrative records and the opinion of the court below (R. 589) International Woodworkers of America, Local 6-7, was in compliance with Section 9 (h) both at the time the charge was filed and when the complaint issued.

guage of Section 9 (h). Section 9 (h) provides that "no complaint shall be issued pursuant to a charge * * * unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period * * * ." The "unless" clause clearly modifies the limitation "no *complaint* shall be issued." This has been the consistent administrative interpretation adopted by the Board. (See cases cited in note 2, *infra*, p. 4). The court below, however, reads the "unless" clause as though it modified only the descriptive phrase "pursuant to a charge." That interpretation in effect transforms the language "no complaint shall be issued" to read "no charge shall be entertained." Grammatically unjustified, that transformation does violence to the manifest intention of Congress, for Congress demonstrated in this very Section that when it desired to limit the power of the Board *"to entertain"* a proceeding instituted by a non-complying labor organization, it knew precisely how to say so.

With respect to representation proceedings which are initiated by petitions filed with the Board pursuant to Section 9 (c), Section 9 (h) provides that "no investigation shall be made * * * of any question * * * concerning the representation of employees." Congress thus did not preclude the Board from "entertaining" representation petitions filed by non-complying unions, but it did preclude the Board from conducting any investigation of such a petition unless and until the pe-

titioning union came into compliance. In sharp contrast, with respect to union shop election proceedings,[4] which are also initiated by petitions filed with the Board, Section 9 (h) provides that "no petition under section 9 (e) (1) shall be entertained." Congress thereby enjoined the Board not even to entertain union shop election petitions filed by non-complying unions. The language of the third clause, "no complaint shall be issued," which Congress applied to unfair labor practice cases, is not the equivalent of either of the preceding two limitations. Read in the light of the statutory unfair labor practice procedure which had been in effect for twelve years prior to the 1947 amendment, the limitation in unfair labor practice cases was manifestly intended to permit the Board to receive unfair labor practice charges filed by non-complying unions, and to investigate such charges if it desires to do so, but to prohibit the issuance of a complaint on behalf of a union which has not, by that time, come into compliance.[5]

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[4] This case is controlled by the provisions of Section 9 (h) as originally enacted, which are set forth in the Appendix, p. 16, *infra*. Subsequent to the Board's decision here, the provisions for holding union-shop elections were eliminated from the Act, and, in conformity therewith, the reference to union-ship petitions was deleted from Section 9 (h). Public Law 189, 82nd Cong., 1st Sess., approved October 22, 1951, and n. 9, pp. 10-11, *infra*.

[5] As a matter of administrative policy, the Board, to conserve its budget and personnel, shortened the grace period which the statute permits. Instead of affording the full period between filing of the charge and the issuance of a com-

Congress' enumeration of the three different kinds of proceedings in Section 9 (h), and its use of different words to describe the limitation applicable to each, furnishes "strong reasons for supposing that so striking a change in expression could only have proceeded from a deliberate difference of intent." L. Hand, J., in *Securities and Exchange Commission* v. *Collier*, 76 F. 2d 939 (C. A. 2). See also *Crawford* v. *Burke*, 195 U. S. 176, 190. To ascribe the differences in language merely to inadvertence is to overlook the fact that Congress was obviously familiar with the three different types of proceedings and that the language it used is, in each case, appropriate to the procedure to which it applies. By giving no effect what-

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plaint for compliance, the Board provided for dismissal of a charge unless there has been compliance with Section 9 (h) "within a reasonable period * * * not to exceed 10 days" after the charge has been filed. National Labor Relations Board, Statement of Procedure, 29 C.F.R., Sec. 101.3 (1949 ed.). The Board grants additional extensions, up to the time the complaint is filed, if the charging union demonstrates that it is making good faith efforts to come into compliance and there is reason to believe that compliance will be achieved within a reasonably short period. Under the interpretation of the court below, of course, the Board could not allow even this 10-day period for compliance.

The Board's 10-day rule was satisfied here because, as understood and applied at the time the instant charge was considered and the complaint issued, that rule did not contemplate compliance with Section 9 (h) by officers of parent federations. Thus, the Board was without authority to issue the complaint here only if, as the court below concluded, Section 9 (h) speaks as of the time the charge was filed.

ever to those differences, the court below violated the "cardinal rule" that "significance and effect shall, if possible, be accorded to every word" and clause of a provision. *Ex parte The Public National Bank of New York*, 278 U. S. 101, 104.[6]

Reading the statute as Congress wrote it is consistent with the general policy of the legislation. In unfair labor practice cases, to permit retention of the privilege of filing a charge before the statute of limitations runs, even if the union may not be able during the six month period to achieve complete compliance, both preserves the possibility of remedying unfair labor practices which might otherwise fortuitously be lost and constitutes an incentive to compliance. Both objectives are consonant with Congress' purposes in enacting the statute.

That the language of the statute is plain and unambiguous was recognized by the Joint Committee on Labor-Management Relations. The problem was called to the attention of the Joint Committee in June 1948, by General Counsel Denham, who pointed out that, due to the variations in Section 9 (h), he was obliged to make different allowances for compliance in the different types of cases; that, for unfair labor practice cases, compliance was only required by the time a complaint

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[6] Accord: *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U. S. 204, 208; Sutherland, *Statutory Construction* (3d ed., 1943), Sec. 4705; 50 *American Jurisprudence*, § 274.

was to be issued; and that, by thus providing a period between filing of the charge and the issuance of a complaint for compliance, Section 9 (h) was impairing the six-month limit on the filing of charges, imposed by Section 10 (b).[7] In its report, issued in December 1948, the Committee recognized that these differences were necessitated by the specific language of Section 9 (h), and recommended that the Section be amended to read "no petition under Sections 9 (c) and 9 (e) (1), and no charge by a labor organization under section 10 (b) *shall be entertained unless* * * *". (Emphasis added.)[8] Although, in October 1951, Congress amended the Act, including, *inter alia*, an amendment of Section 9 (h) itself, this recommendation of the Joint Committee was not adopted. Public Law 189, 82nd Cong., 1st Sess., approved October 22, 1951.[9]

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[7] Hearings before the Joint Committee on Labor-Management Relations, 80th Cong., 2nd Sess., pp. 1171-1172.

[8] Report of the Joint Committee on Labor-Management Relations, S. Rep. No. 986, Pt. 3, 80th Cong., 2nd Sess., pp. 41-43.

[9] The object of this amendment was to avoid the holding of new representation elections in cases where the prior elections had been made vulnerable by this Court's decision in the *Highland Park* case, *supra*, and to eliminate altogether the necessity for holding union-shop elections as provided in Section 9 (e). The only change which the amendment made in the original text of Section 9 (h) was to delete the words "no petition under section 9 (e) (1) shall be entertained." The legislative history emphasizes that this amendment was not intended to affect whatever provisions the original Section

2. The court below clearly erred in concluding that the *Highland Park* decision, 341 U. S. 322, supported its interpretation of Section 9 (h). In that case, the C. I. O.'s compliance with Section 9 (h) occurred *after* the complaint had issued,[10] and thus the problem here presented, the effect of compliance perfected *before* complaint but after charge, was not before this Court. In view of the facts before the Court in that case, the statement in the opinion—"While the C. I. O. officers have since filed the affidavits, they were not on file at any time relevant to this proceeding" (341 U. S., at 325)—means only that a complaint which has been issued at a time when the charging union was not in compliance is not validated retroactively by subsequent compliance.

3. The question presented is of substantial importance in the administration of the Act. There are about ten additional cases, already in the Courts of Appeals or about to be filed therein, in

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9 (h) had made respecting the time when its disqualification becomes effective. 97 Cong. Rec. 10463-10464; H. Rep. No. 1082, 82nd Cong., 1st Sess., p. 2.

[10] As the Board's decision reveals (*Highland Park Manufacturing Company*, 84 NLRB 744, 749), the complaint was issued on January 10, 1949, more than twelve months before the C.I.O.'s compliance. Similarly, in all the other cases relied on by the court below (R. 589), the federation compliance occurred after the complaint had issued. See the Board's decisions in *Postex Cotton Mills, Inc.*, 80 NLRB 1187, 1189; *J. I. Case Company, Bettendorf Works*, 89 NLRB 269; *Clark Shoe Company*, 88 NLRB 989, 991.

which, like the instant case, compliance with Section 9 (h) was effected after the charge was filed but before any complaint issued. The identical situation is also present in approximately eight other cases which are still before the Board in various stages of decision, and in an unascertainable number of cases still in the Board's field offices. In addition, if the decision of the court below stands, the Board would be precluded from deciding cases based on complaints issued after the C. I. O. came into compliance where a previous complaint based on the same charge had been dismissed pursuant to the *Highland Park* decision, *supra*. The General Counsel has already authorized the issuance of new complaints in two such cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

GEORGE J. BOTT,
General Counsel
National Labor Relations Board.

MAY, 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*), are as follows:

* * * * *

"SEC. 9. * * *

* * * * *

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for

the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which

it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.